United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

No. 74-1762

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

S. H. KRESS AND COMPANY,
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Company received a fair hearing

The post-election hearing was to resolve a few, largely factual issues: the organizing activities of supervisors Guzman and Feliciano; and the employment status of Sonia Morales, Maria Aviles, Bernardo Martinez (which turned on the work they actually performed), and Carmen Valentin

(which turned on whether she was on vacation at the time of the election).[1] The Hearing Officer resolved these issues largely on the basis of credibility determinations, finding in favor of the Company with respect to the status of Martinez.[2] The Company has launched an extensive attack on the Hearing Officer, centering on his treatment of witness Porfirio Fernandez.

Fernandez testified (A. 343-346) that he had neither read nor had read to him the statement he gave to the Board. Since the statement witnessed by Board Agent Reisinger is to the contrary, this testimony directly impugned the Board Agent. Accordingly, as required by Board Rules and Regulations, Series 8 (29 C.F.R.), Section 102.118, the Region obtained the permission of the General Counsel to have Reisinger testify in this connection (A. 43) and he did so (A. 537-545). The Company contends (Br. 44) that this was improper, since the Company was not permitted to call other Board agents who took statements and was not permitted to question Reisinger about other statements he took from Fernandez. The Company laid no foundation for examining other Board agents or for examining Reisinger about other statements about which

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[1] Compare the Company's claim (Br. 5, 28, n. 20, 46) that because of the assertedly "broad range of both legal and evidentiary issues" the Hearing Officer's declining to accept a trial brief from the Company – in addition to the Company's exceptions to the Regional Director's initial, prehearing findings, which defined the issues at the hearing – warrants this Court's rejecting his credibility determinations.

[2] The Company asserts (Br. 6-8) that a "substantial evidence" rather than an "abuse of discretion" standard should be applied by the Court. Actually a substantial evidence standard may appropriately be applied in examining the record support for primary factual determinations – for example, that Valentin was on vacation – since the Board does not claim discretion in that respect. Where the issue involves judgment as to the significance of facts found – for example, the determination as to whether the activities of Guzman and Feliciano precluded a fair election – the standard is clearly one of an abuse of discretion. Cf. *N.L.R.B. v. Krieger-Ragsdale & Co.*, 379 F.2d 517, 519-520 (C.A. 7, 1967), cert. den., 389 U.S. 1041.

Fernandez had not testified. Since the Company was allowed to cross-examine Reisinger fully about the circumstances in which this statement was taken and did not recall Fernandez, the assertion (Br. 44) that the rulings made it "impossible [for the Company] to attack [Reisinger's] credibility or to rehabilitate Fernandez" is clearly unwarranted.

The Company also asserts (Br. 45) that the Hearing Officer "refused to permit the Company to have its own Spanish interpreter" and that Fernandez was discredited on the basis of "minor discrepancies in his testimony which could conceivably be errors made by the Board's interpreter." The record shows, however, that the Hearing Officer simply declined, in the face of the Union's objection, to allow the Company to use as an interpreter a witness who had been sequestered on the Company's own motion and who had not testified (A. 331, 333-334). Moreover, Fernandez was discredited, not on the basis of some unspecified minor discrepancy, but on the basis of demeanor and the absence of corroboration for his testimony that Abreu *returned* to the store during the balloting (A. 47).

The Company's final assertion with respect to the conduct of the Hearing Officer (Br. 45, n. 32) is that he "ignored, without reason, documentary evidence" – namely, the Company's instructions (A. 157-159) to employees to "avoid" seeking vacations during such peak periods as "Christmas, Easter, School Openings" which the Company claims was relevant because Valentin assertedly went on vacation the day before Easter. Since Valentin, who worked in the stationery department, needed to take her vacation at that time to take care of her daughter's new baby (A. 61-62), the documentary evidence would hardly impeach her uncontradicted testimony that former Manager Williams gave her permission to take off because Valentin, who had worked for the Company three years, was a "good worker" (A. 61-62). The conflict in testimony

between Valentin and Marks concerned, not the propriety of her leaving at that time, but whether Marks approved Williams' agreement that Valentin could work parttime after April 15 until she could make other arrangements about the baby (A. 62; 411, 493-496). Clearly, the documentary evidence had no relevance to either issue and the Hearing Officer's omitting a discussion of it offers no basis for attacking his credibility determinations.

The Company's remaining fair hearing contention – that counsel for the Regional Director failed to exercise appropriate self-restraint in filling the limited role assigned to her in such proceedings – obviously involves a question of judgment as to the appropriate participation. We submit that counsel did not exceed her proper role and that in any event the Company has not even suggested how it could have been prejudiced by the conduct it attributes to Regional counsel.

2. The findings with respect to Guzman and Feliciano

The Company's principal disagreement with the Board's findings concerns the significance of the activities of supervisors Guzman and Feliciano. The Company begins (Br. 23-24) with an attack on the Board's finding that they were "low level" supervisors, asserting that "uncontradicted" testimony establishes that department managers could "discipline" and "discharge" employees. The testimony relied on by the Company, however, is with respect to the asserted "authority" of the department managers as a group, while the Board's contrary finding is based on the testimony of Guzman and Feliciano as to their authority as conveyed to them (Bd. Br. 8). Indeed, the distinction between the preelection and the postelection records as well as the two decisions in this respect (Co. Br. 24), is in the precise definition of their authority, for in the earlier

proceeding, the authority of *all* the department managers was equally relevant, while the precise authority of Guzman and Feliciano was immaterial so long as they possessed *any* of the powers specified in Section 2(11) of the Act, and they clearly had the authority "responsibly to direct" employees.[3] In any event, it is undisputed that Guzman and Feliciano are first-level supervisors who spend much of their time doing the same work as the employees.

Although the Hearing Officer alluded (A. 50) to the Board's *Ideal Electric* rule,[4] which provides that ordinarily only conduct occurring after the filing of the petition can be alleged as the basis for an objection to the election, the Company's assertion (Br. 26) that it was precluded from offering probative evidence because of the application of the *Ideal Electric* rule is unfounded.

To be sure, the Regional Director expressly relied on that rule in declining to investigate the Company's allegations that supervisory influence tainted the Union's showing of interest, although he principally relied on the ground that the Company's allegation was untimely under the Board's procedure, absent special circumstances, and that no special circumstances existed (A. 25).[5] The Board reversed him and ordered a

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[3] Contrary to the Company's assertion (Br. 24, n. 17) such partial relitigation of "supervisory" status is not inconsistent with *N.L.R.B. v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 249, 251 (C.A. 5, 1964). The issue in that case was whether an employer could deliberately withhold evidence in the representation case which went to the *unit* issue and then raise that issue in the unfair labor practice case following certification. The policy considerations there involved were totally different from those applicable to litigating related – but distinct – issues in pre- and postelection proceedings in the representation case, when the initial unit finding is not affected.

[4] *The Ideal Electric & Mfg. Company*, 134 NLRB 1275, 1277-1278 (1961).

[5] The Board's Field Manual, Section 11028.4, under "Showing of Interest" provides:

(Continued)

hearing, however, based on the Company's Objection 7, and the Company's allegations of extensive supervisory influence tendered in support of its attack on the showing of interest (Br. 26, R.A. 3-12) were not supported by competent, credited evidence. Neither the Board's order of October 16, 1972, nor the evidentiary rulings at the hearing, however, precluded the Company's fully exploring this matter from the beginning of the campaign in January, 1972, and this was in fact the scope of that inquiry (A. 368-370, 379-382, 595-598, 601-606, 631-634). Thus, while the possible impact of *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270 (1974) on the application of *Ideal Electric* to pre-petition card solicitation by supervisors is an open question, that issue is not presented here, for the one authorization card solicited by Feliciano would not require that this election be set aside, assuming that the *Ideal Electric* rule was modified in this respect by *Savair.*[6]

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[5] (Continued)

> *Evidence of fraud sought to be introduced at hearing:* if evidence of fraud is sought to be introduced at the hearing, the line of questioning should not be permitted. The party desiring to present such evidence should be advised on the record to bring it administratively to the attention of the Regional Director within 5 working days from that date; the hearing should *not* be interrupted.
>
> If the issue is not raised at the hearing or within 5 working days after its close, no investigation will be made, unless special circumstances exist. *Globe Iron Foundry*, 112 NLRB 1200.

Although this manual is available to the public, the adequacy of the showing of interest is essentially a concern of the Board, since as we noted (Bd. Br. 10, n. 6) the showing of interest requirement is an administrative device to conserve Board resources. Once an election is imminent, the Board ordinarily prefers to allow the election itself to determine the employee's desires, leaving the objection procedure – as well as the Board's inherent powers – to insure the fairness of the election. Compare the Company's assertion (Br. 10, n. 7) that the Director acted on a "whim."

[6] In *Gibson's Discount Center*, 214 NLRB No. 22 (1974), 87 LRRM 1291, 1292, the Board recognized that *Savair* altered the application of *Ideal Electric* with respect to pre-petition card solicitations accompanied by an offer to waive initiation fees.

(Continued)

In short, we submit that the Company's attack on the Hearing Officer's credibility determinations must fail and the credited testimony establishes that there was nothing more than union support by "two low level supervisors, followed by a 2-month hiatus, [which] did not prevent employees from exercising their freedom of choice in the election" (A. 54). Accord: *N.L.R.B. v. WRKG-TV, Inc.*, 470 F.2d 1302, 1315 (C.A. 2, 1973); *N.L.R.B. v. Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1178 (C.A. 2, 1968); *N.L.R.B. v. Aero Corporation*, 363 F.2d 702, 707-708 (C.A.D.C., 1966); *N.L.R.B. v. Ozark Motor Lines*, 403 F.2d 356, 359 (C.A. 8, 1958); *N.L.R.B. v. Kane*, 435 F.2d 1203, 1207 (C.A. 4, 1970).

3. The remainder of the Company's contentions are treated in full in our opening brief.[7] We wish to point out, however, that since our opening brief was filed, this Court has had occasion to pass on the Board's application of its *Milchem* rule (Bd. Br. 6-8). *N.L.R.B. v. The Newton-New Haven Company*, ____ F.2d ____ (No. 74-1286, November 25, 1974), sl. op. pp. 477-480, 87 LRRM 2999).

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[6] (Continued) *Gibson's*, however, involved precisely that situation, not "pre-petition misrepresentations in obtaining authorization cards" (Co. Br. 27) and the Board in *Gibson's* expressly stated that it did not "otherwise intend any broad departure from the *Ideal Electric* rule" (*ibid.*).

[7] It might be noted that the Board's brief contains no "argument that [Congressman] Badillo should not be considered the Union's agent" (Co. Br. 13, n. 10) in connection with his visit to the store (Bd. Br. 14-15).

CONCLUSION

For the foregoing reasons and for the reasons stated in our opening brief, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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December, 1974.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. S. H. KRESS AND COMPANY, Respondent.	)	No. 74-1762

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D. C.

this 23rd day of December, 1974